

September 16, 2005

S. 147, Native Hawaiian Government Reorganization Act of 2005

Facts on Substitute Amendment

Discussions between Hawaii's Congressional delegation, Hawaii's Attorney General, and officials from the Department of Justice, Office of Management and Budget, and the White House have resulted in legislative language which maintains the intent and purpose of S. 147/H.R. 309, the Native Hawaiian Government Reorganization Act of 2005, while at the same time addressing policy concerns identified by the Executive Branch in July 2005. In a letter sent to Senator John McCain, Chairman, Senate Committee on Indian Affairs, the Department of Justice outlined four policy issues of concern: liability of the United States related to land claims, impact of the bill on military readiness, gaming, and civil and criminal jurisdiction. Throughout the negotiations process, Hawaii's Congressional delegation and Governor remained steadfast in their commitment in maintaining the intent and purpose of this bill which is to extend the federal policy of self-governance and self-determination to Native Hawaiians for the purposes of a federally recognized government-to-government relationship.

Liability of the United States

With respect to liability of the United States as it relates to land claims, Senator Akaka, as the author of the Apology Resolution as well as S. 147, has always maintained that his legislation is not intended to serve as a settlement of any claims nor as a cause of action for any claims. Administration officials sought to extinguish any existing claims by Native Hawaiians related to breach of trust, land claims and resource-management or resource-protection claims. The Congressional delegation and Governor prevailed in preventing the extinguishment of claims. The substitute amendment makes clear that any grievances regarding historical wrongs committed against Native Hawaiians by the United States or by the State of Hawaii are to be addressed in the negotiations process between the Native Hawaiian governing entity and Federal and State governments.

The substitute amendment clearly states that the Act does not serve to create a cause of action, alter existing law or create additional obligations with respect to claims. The substitute amendment allows the federal government to assert sovereign immunity against any claims against the United States related to breach of trust, land claims, resource-management and resource protection claims by Native Hawaiians. The effect of this language is that the claims become non-justiciable in a court of law. The claims, therefore, may not be heard in a court of law, but may be resolved in the negotiations process between the Native Hawaiian governing entity and federal and state governments.

Military Readiness

The Department of Defense currently consults with Native Hawaiians under the Native Graves Protection and Repatriation Act (NAGPRA) and the National Historic Preservation Act (NHPA). The Department objected to the consultation requirements expected to be facilitated by the Office of Native Hawaiian Relations in the Department of the Interior. The substitute amendment exempts the Department of Defense from these consultation requirements. In addition, the Department of Defense objected to the coordination and consultation requirements to be facilitated by the Native Hawaiian Interagency Coordinating Group. The substitute amendment therefore exempts the Department of Defense from the requirements associated with the Native Hawaiian Interagency Coordinating Group.

Gaming

S. 147 as reported makes clear that the Indian Gaming Regulatory Act, the federal law which governs gaming by Indian tribes on Indian lands in the United States, does not apply to the Native Hawaiian governing entity. The Executive Branch officials pursued stronger language to clarify the fact that the bill did not authorize gaming by the Native Hawaiian governing entity. The substitute amendment includes language which states that gaming may not be conducted by Native Hawaiians or the Native Hawaiian governing entity as a matter of claimed inherent authority or under the authority of any federal laws or regulations promulgated by the Secretary of the Interior or the National Indian Gaming Commission. The substitute amendment also makes clear that the prohibition applies to any efforts to establish gaming by Native Hawaiians and the Native Hawaiian governing entity in Hawaii and in any other State or territory. This language only applies to efforts to establish gaming operations as a matter of inherent authority as indigenous peoples or under federal laws pertaining to gaming by native peoples.

Civil and Criminal Jurisdiction

The substitute amendment includes language which makes clear that civil and criminal jurisdiction currently held by the federal and state governments remain with the federal and state governments unless otherwise negotiated and implementing legislation is enacted.

Certification Commission Amendment

The bill initially required that members of the certification commission be Native Hawaiian. The substitute amendment removes the Native Hawaiian requirement and instead requires that the commissioners have at least 10 years of demonstrated experience in the study and determination of Native Hawaiian genealogy and an ability to read and translate into English documents written in the Hawaiian language. The purpose of the commission is to establish the eligibility criteria for Native Hawaiians who sign up to be on the roll.

Single Entity

The substitute amendment makes clear that the bill authorizes the recognition of a single Native Hawaiian governing entity.

Special Political and Legal Relationship

The substitute amendment defines the special political and legal relationship between Native Hawaiians and the United States as the same type of relationship that the United States has with federally recognized Indian tribes.